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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

FEDERICO VEIZA,

Defendant and Appellant.

B171160

(Los Angeles County  
Super. Ct. No. NA056644)

APPEAL from a judgment of the Superior Court of Los Angeles County.

Richard R. Romero, Judge. Affirmed with order.

Susan K. Keiser, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Marc E. Turchin and Alene M. Games, Deputy Attorneys General, for Plaintiff and Respondent.

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## **INTRODUCTION**

Appellant Federico Veiza challenges his attempted murder conviction on the grounds of insufficiency of evidence, prosecutorial misconduct, ineffective assistance of counsel, instructional error, and police failure to collect exculpatory evidence. We conclude ample evidence, including appellant's declared intent to kill the victim, supports his attempted murder conviction. The prosecutor's argument that the defense psychiatric expert did not testify appellant was incapable of forming the specific intent to kill was permissible because it responded to argument by defense counsel stating that the expert concluded appellant did not form the specific intent to kill. Because any objection to the prosecutor's argument would have been meritless and futile under the circumstances, defense counsel was not ineffective for failing to object to the argument. Moreover, the police did not violate due process by failing to test appellant's blood alcohol level because there was no apparent exculpatory value in his blood alcohol level and no evidence of bad faith. The failure to test appellant's blood alcohol level did not require the trial court to modify CALJIC No. 2.11.

## **BACKGROUND AND PROCEDURAL HISTORY**

At a party, appellant drew a knife and cut Jose Solarzano's throat. Solarzano ran, and appellant chased him, exclaiming that he was going to kill him. Oscar Tapia chased appellant and urged him to leave Solarzano alone and drop the knife. Appellant stated he would attack Tapia, and then chased him for a block, waving the knife toward him as if to stab him.

A jury convicted appellant of attempted murder and assault with a deadly weapon. With respect to the attempted murder count, the jury found appellant personally used a knife and personally inflicted great bodily injury. The trial court sentenced appellant to 11 years in prison.

## DISCUSSION

### **1. Ample evidence supported a finding that appellant specifically intended to kill Solarzano.**

Appellant contends the evidence was insufficient to show that he had the specific intent to kill Solarzano. He bases his contention upon evidence from the witnesses and a responding police officer indicating that appellant was intoxicated at the time of the offense and upon the testimony of Dr. Kaushal Sharma, a psychiatrist who testified for the defense. Dr. Sharma opined that appellant was in an alcoholic blackout state at the time of the attack. He further testified that a person in an alcoholic blackout “would have substantial problem in being able to use his mental faculties to do any specific goal directed at [*sic*].”

To resolve this issue, we review the whole record in the light most favorable to the judgment to decide whether substantial evidence supports the conviction, so that a reasonable jury could find guilt beyond a reasonable doubt. (*People v. Ceja* (1993) 4 Cal.4th 1134, 1138.) An attempt to commit a crime occurs when the perpetrator, with the specific intent to commit the crime, performs a direct but ineffectual act towards its commission. (Pen. Code, § 21a; *People v. Dillon* (1983) 34 Cal.3d 441, 452-453.) To convict appellant of attempted murder, the jury was required to find that he specifically intended to kill the victim. (*People v. Lee* (1987) 43 Cal.3d 666, 670.) Although a defendant may not attempt to establish that he was unable to form a particular mental state due to voluntary intoxication, evidence of intoxication is admissible to prove that the defendant did not actually form a required mental state, such as an intent to kill. (Pen. Code, § 22.)

Based upon the uncontradicted evidence that appellant cut Solarzano’s throat with a knife, chased after Solarzano with the knife when Solarzano fled, and verbally declared his intent to kill Solarzano as he chased after him, the jury could find, beyond a reasonable doubt, that appellant specifically intended to kill Solarzano. In addition, when responding police officers drove toward appellant in an alley two blocks from the scene

of the party, appellant tossed his bloody knife toward a wall and continued walking. From this act, jurors could infer appellant's consciousness of guilt, a state of mind inconsistent with an alcoholic blackout. The jury heard the evidence regarding intoxication and the possibility appellant was operating in a blackout state. It was instructed it could consider the evidence of appellant's intoxication in determining whether he possessed the specific intent to kill Solarzano. It was further instructed to give appellant the benefit of any reasonable doubt regarding whether he harbored the requisite specific intent. The jury clearly resolved the issue against appellant, and substantial evidence supports its verdict. His sufficiency of evidence contention essentially asks this court to re-weigh the evidence to give additional weight to the intoxication defense and to substitute its judgment for that of the jury. We are neither empowered nor inclined to do so.

**2. The prosecutor did not commit prejudicial misconduct and defense counsel did not render ineffective assistance.**

Defense counsel asked Dr. Sharma to state his "opinion or conclusion regarding Mr. Veiza's mental state at the time of the incident." The prosecutor asked to approach the bench, and then explained that the doctor was not permitted to testify that appellant was unable to form a specific intent. The court sustained the implicit objection and added that the doctor was also not allowed to testify about appellant's state of mind at the time of the offense. Dr. Sharma then testified that he concluded that appellant was in an alcoholic blackout at the time of the crime. On cross-examination, Dr. Sharma conceded that fleeing the scene and discarding the knife suggested a consciousness of guilt and desire to avoid apprehension, and that appellant's statement that he was going to kill the victim and his conduct in pulling a knife from his pocket or waistband, cutting the victim's throat, and chasing the injured victim suggested aggressive behavior and implied a state of mind of "intent to be aggressive if possible or killing." He further conceded that appellant's statement that he was going to kill the victim showed "his mental state and implication that this is what he was thinking." He later testified that someone in an

alcoholic blackout could say he was going to kill someone and could “try to kill” someone.

Defense counsel’s closing argument relied heavily upon Dr. Sharma’s testimony. Counsel argued, *inter alia*, “Now [the prosecutor], on his opening statement, characterized his last question to Dr. Sharma saying could a person in an alcoholic blackout form the specific intent to kill? And although Dr. Sharma said yes, but what Dr. Sharma had really said and didn’t say was that in this case, it was his conclusion that Mr. Veiza did not have the specific intent to kill in this particular case and that’s what’s at issue.”

In his closing argument, the prosecutor responded with the following disputed argument: “Dr. Sharma never once said that the defendant could not form specific intent. What he said was when I asked him if you are in blackout, does that prevent you from forming specific intent? He said no.”

Appellant contends that by making the above-quoted argument, the prosecutor committed prejudicial misconduct. He argues the prosecutor’s statement was unfair because the prosecutor had successfully excluded, pursuant to Penal Code section 29, Dr. Sharma’s testimony that appellant could not form the requisite specific intent. He further characterizes the argument in question as a comment upon appellant’s exercise of his right not to testify.

Preliminarily, the trial court properly precluded Dr. Sharma from stating an opinion regarding whether appellant specifically intended, or had the capacity to specifically intend, to kill Solarzano. Penal Code section 28, subdivision (a) precludes the admission of evidence of “mental disease, mental defect, or mental disorder” for the purpose of proving or negating “the capacity to form any mental state, including, but not limited to, purpose, intent, knowledge, premeditation, deliberation, or malice aforethought, with which the accused committed the act.” Penal Code section 29 prohibits an expert testifying about a defendant’s mental illness, mental disorder, or mental defect from testifying “as to whether the defendant had or did not have the

required mental states, which include, but are not limited to, purpose, intent, knowledge, or malice aforethought, for the crimes charged.”<sup>1</sup>

If a prosecutorial misconduct claim is based on the prosecutor’s arguments to the jury, we consider how the statement would, or could, have been understood by a reasonable juror in the context of the entire argument. (*People v. Dennis* (1998) 17 Cal.4th 468, 522; *People v. Benson* (1990) 52 Cal.3d 754, 793.) No misconduct exists if a juror would have taken the statement to state or imply nothing harmful. (*People v. Benson, supra*, 52 Cal.3d at p. 793.) A prosecutor may make comments that would otherwise be improper if they are fairly responsive to argument of defense counsel and based on the record. (*People v. McDaniel* (1976) 16 Cal.3d 156, 177.)

Absent a showing that the harm could not have been cured, an appellant may not complain of prosecutorial misconduct unless he objected to the alleged misconduct in a timely fashion at trial and requested that the jury be admonished to disregard the impropriety. (*People v. Benson, supra*, 52 Cal.3d at p. 794.)

Appellant did not object to the argument in issue. Assuming, for the moment, the validity of the complaint raised regarding this argument, the trial court could easily have remedied any impropriety by admonishing the jury that the rules of evidence precluded Dr. Sharma from testifying that appellant could not or did not form the required specific intent, and that jurors must therefore not consider his failure to so testify. Appellant’s claim that such an admonition would have been too confusing for the jurors disparages the intelligence of jurors and ignores the complexity inherent in many of the jury instructions routinely employed by trial courts. Accordingly, appellant forfeited all claims of error regarding the argument in question.

Appellant alternatively claims his attorney was ineffective for failing to object to the argument in controversy. A claim that counsel was ineffective requires a showing, by a preponderance of the evidence, of objectively unreasonable performance by counsel

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<sup>1</sup> This limitation does not apply to the penalty phase in a capital trial.

and a reasonable probability that, but for counsel's errors, appellant would have obtained a more favorable result. (*People v. Ledesma* (1987) 43 Cal.3d 171, 216-218.)

Defense counsel did not perform in an objectively unreasonable manner by failing to object to the argument in issue because it was permissible argument. The argument was responsive to defense counsel's own argument that Dr. Sharma concluded appellant did not have the specific intent to kill. Dr. Sharma did not testify that appellant lacked the specific intent to kill. Penal Code section 29 prohibited such testimony and the prosecutor's timely objection during Dr. Sharma's direct testimony prevented the admission of such testimony. Accordingly, any objection by defense counsel to the argument in question on the ground that Dr. Sharma was prohibited from testifying that appellant could not form specific intent would have been futile, as defense counsel's prior argument invited the prosecutor's response.

Additionally, the argument in question did not violate the prohibition on commenting on the defendant's failure to testify. The argument in question was exclusively addressed to the expert testimony by Dr. Sharma, and no reasonable juror would have understood it as making any reference to the fact appellant did not testify.

Defense counsel, however, should have objected to the argument in issue on the ground that it misstated the evidence. The prosecutor did not ask Dr. Sharma whether an alcoholic blackout prevented a person from forming specific intent, and Dr. Sharma never testified that it did not, as the prosecutor asserted in the second sentence of the challenged argument. Accordingly, the prosecutor's argument misrepresented Dr. Sharma's testimony. Nonetheless, given the strong evidence of appellant's intent to kill, as shown by his words and conduct toward Solarzano, along with Dr. Sharma's concessions that appellant's words and conduct implied he intended to kill Solarzano, there is no reasonable probability appellant would have obtained a more favorable result if his attorney had objected successfully to the prosecutor's argument and the court had admonished the jury to disregard the argument. Moreover, any potential prejudice was dissipated by the jury instruction that statements made by the attorneys were not

evidence. (*People v. Hughey* (1987) 194 Cal.App.3d 1383, 1396.) Accordingly, counsel's failure to object does not constitute ineffective assistance of counsel.

**3. The police did not violate due process by failing to test appellant's blood alcohol level.**

Appellant contends the police violated his right to due process by failing to test his blood alcohol level after his arrest. He argues that, at a minimum, the trial court should have instructed the jury it could draw an inference adverse to the prosecution from the "failure to preserve appellant's blood sample."

Appellant did not raise this issue in the trial court or ask for any sanction, such as the instruction he claims the court should have given. Accordingly, he forfeited his claim.

Even if appellant had not forfeited his claim, it would have no merit. The due process clause imposes upon police a duty to preserve evidence that might be expected to play a significant role in a suspect's defense. (*People v. Roybal* (1998) 19 Cal.4th 481, 509.) If all that the defendant can say about the lost material is that it could have been tested and the results might have exonerated him, the defendant must show that the police acted in bad faith in losing or disposing of the material. (*Id.* at p. 510.)

Appellant presented his intoxication claim without the blood alcohol testing evidence. Dr. Sharma did not testify that alcoholic blackout necessarily occurred when a particular blood alcohol level was attained. At best, the test result might have lent some weight to his claim that he was extremely intoxicated. At worst, the result might have shown that he was not as intoxicated as he would have liked the jury to believe. In either case, the result would not have established that his intoxication precluded him from forming the specific intent to kill Solarzano. Moreover, it would not have negated or weakened the eyewitness and victim testimony identifying appellant as the assailant and proving his conduct toward Solarzano and Tapia and his express statement of intent to kill Solarzano. Further, the test result would not have negated the inference of consciousness of guilt supported by appellant's disposal of the knife as the police



approached him. Under the most favorable view, had the police taken a sample of his blood, it could have been tested and might have strengthened his defense. Accordingly, appellant must show bad faith on the part of police. Nothing in the record supports a claim of bad faith. Because voluntary intoxication is not a defense, and nothing in the record suggests the officers knew or should have known appellant's intoxication was so severe he may not have been able to form the specific intent to kill, the officers cannot be deemed to have been acting in bad faith. Nothing in the record indicates appellant or anyone else requested that his blood alcohol level be tested. Appellant's claim therefore does not approach the level of a denial of due process.

**4. The trial court was not required to modify CALJIC No. 2.11.**

The trial court instructed the jury with CALJIC No. 2.11, which provides as follows: "Neither side is required to call as witnesses all persons who may have been present at any of the events disclosed by the evidence or who may appear to have some knowledge of these events. Neither side is required to produce all objects or documents mentioned or suggested by the evidence."

Appellant contends this instruction should have been modified. Citing Evidence Code section 412, he argues he was entitled to an instruction that the prosecution's evidence of his intent should be viewed with distrust because it failed to introduce his blood alcohol test results.

Because appellant failed to raise his contention in the trial court or ask the court to modify CALJIC No. 2.11, he may not contend on appeal that the trial court's failure to sua sponte modify the instruction was error. (*People v. Kelly* (1992) 1 Cal.4th 495, 535-536.)

Moreover, appellant's claim has no merit. Evidence Code section 412 provides that "[i]f weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust." Evidence of appellant's blood alcohol level cannot be characterized as stronger and more satisfactory evidence of appellant's specific intent to

kill Solarzano than the testimony of the victim and witnesses that appellant drew a knife, cut Solarzano's throat, stated he was going to kill Solarzano, and chased after Solarzano with the knife as Solarzano literally ran for his life. Appellant's contention confuses the prosecution's evidence of his specific intent to kill with his desire for stronger defense evidence that he lacked such intent. A modification of CALJIC No. 2.11 would not have been appropriate if appellant had requested it. For the same reasons, appellant's alternate characterization of his claim, that CALJIC No. 2.11 reduced the prosecution's burden of proof, also has no merit.

**5. The abstract of judgment must be corrected.**

The abstract of judgment incorrectly reflects the sentence imposed. It indicates the three-year sentence for count 3 was consecutive, whereas the court specified a concurrent sentence for that count. The abstract of judgment also fails to reflect the three-year Penal Code section 12022.7, subdivision (a) enhancement imposed upon count 1. If the trial court has not already done so, it must correct these errors in an amended abstract of judgment.

**DISPOSITION**

The judgment is affirmed. Unless the trial court has already corrected the abstract of judgment, it is ordered to issue an amended abstract of judgment conforming to the actual sentence imposed, as described in this opinion.

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BOLAND, J.

We concur:

RUBIN, Acting P. J.

FLIER, J.